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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 287. 40

ADOLFO SIXTO, *Plaintiff in Error,*

vs.

LAUREANO SARRIA, *Defendant in Error.*

ERROR TO THE UNITED STATES DISTRICT COURT FOR PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF FACTS.

On May 15, A. D. 1892, one Manuel Sixto y Andino, who lived in the island of Vieques, a small island to the east of Porto Rico and politically attached to it, was the owner of a farm or rustic estate which he called "Monte Santo," and on the above date he sold the same to the defendant in error for the sum of 16,000 Mexican dollars, the said price to be paid in four equal installments of $4,000 each on the same day of the years 1893 to 1896, inclusive. In the conveyance executed by said Sixto to said Sarria a mortgage lien was reserved upon said property as security for the payment of said purchase price, in addition to the direct promise of said Sarria to pay the same, with interest, as stipulated. (See Record, page 16.)

On November 27, 1892, the said Manuel Sixto y Andino died intestate, leaving no legitimate children or direct heirs,

but leaving two natural children legally recognized, one a girl by the name of Maria Belen Sixto y Melendez, who lived in Vieques, and the other the plaintiff in error, who lived in the island of St. Thomas. Shortly after the death of said Manuel Sixto this daughter, Maria Belen, presented a petition to the court of first instance of Humacao, Porto Rico, alleging that she was the only recognized child, hence the only heir, of said Manuel Sixto, and praying the court to declare her heir *ab intestato* in accordance with the provisions of sections 980 *et seq.* of the Code of Civil Procedure then in force. This was an *ex parte* proceeding, summary in its character, and during its progress, to wit, on June 22, 1893, the defendant in error paid into the court where it was pending the first installment of his debt to Manuel Sixto, deceased, together with the interest. (See Record, page 32.) And thereafter, on November 21, 1893, the said daughter, Maria Belen, was by decree of said court declared heir *ab intestato* of Manuel Sixto, but this declaration was made, as the law required, *without prejudice to the rights of third parties.* (See Record, page 30.) On the 25th day of the same month of November the assets up to that time received by the temporary administrator named during this proceeding, including the money paid in by said defendant in error, were ordered paid over by said administrator to this daughter, now decreed to be sole heir. (See Record, page 31.)

Meantime—and on the very day previous to the signing of the decree adjudging Maria Belen to be sole heir—the plaintiff in error had presented to the same court his petition to be declared an heir of Manuel Sixto in the exercise of voluntary jurisdiction under the same sections of the code previously proceeded under by said Maria Belen, but on the next day—the very day on which her decree is dated—Maria Belen appeared in opposition to his petition, alleging that she had already been declared sole heir, and that he could only contest her right by a contentious proceeding (*expediente*

contensioso). (See Record, page 17.) The court sustained this contention, from which an appeal was taken by plaintiff in error, but afterward abandoned, and on April 4, 1894, plaintiff in error amended his suit to an "*expediente contensioso*," making said Maria Belen a party defendant, praying the court to declare him an equal heir with her in said estate of Manuel Sixto, and further that, for the better security of his rights, the court issue an order to the registrar of property requiring him to make a cautionary entry in his registry touching the property affected by the suit, and also an order to the defendant in error requiring him to retain at the disposition of the court whatever sums he was indebted to the estate of said Manuel Sixto. (See Record, page 18.)

The notices prayed for were issued on June 2, 1894, the one to Sarria, the defendant in error, being served June 5, 1894, and the one to the registrar on the same day, and duly entered by him, as shown by his return to the court under date of June 12, 1894. (See Record, pages 18 and 19.) The defendant, Maria Belen, was also notified of these orders on June 6, 1894, and on the 26th of the same month she answered plaintiff's petition, and in her answer prayed that the interlocutory order of June 2, 1894, should be vacated and the cautionary notices canceled. On August 30, 1894, this prayer of defendant's answer was granted by the court, and on the very next day (August 31) the corresponding orders to the registrar and to Sarria, the defendant in error, were issued at the same time that notice of the court's action was given to the procurador (solicitor) of the plaintiff. The order for said cancellation reached the registrar on September 1, and entry of cancellation was made on his books September 3, 1894. (See Record, page 20.)

On September 3, 1894, the plaintiff filed his petition for an appeal from the court's order of August 30, praying that it be allowed "with both effects" (see sec. 383, Code of Civil Proc.), but the judge granted the same with only one effect. Upon application to the appellate court the

latter, on November 17, 1894, held that the allowance with both effects had been wrongfully denied, and ordered that it be considered as having been taken for both effects. Thereafter, on December 22, 1894, the appellate court granted a further order that Sarria, the defendant in error, be notified of his obligation under the decree of June 2, 1894, and on the 8th of January, 1895, Sarria was served with a copy of such order of the appellate court, the pertinent part of which is as follows: "That which was ordered in the decree appealed from regarding Mr. Laureano Sarria is hereby set aside, leaving in force the requisition ordered and directed to said Sarria on June 2 by the judge of first instance, until the resolution of the pending appeal." (See Record, pages 20–22.)

The defendant in error pretended not to understand the meaning of this order of the appellate court, so at the request of plaintiff's counsel an explanatory order was issued by authority of said court and served upon him on February 8, 1895. (See Record, pages 22–24.)

In this condition matters rested until November 29, 1895, on which date the appellate court (audiencia territorial) rendered its decision on the merits of the appeal, reversing and declaring null the order of August 30, 1894, and reaffirming the validity and regularity of the order of June 2, 1894. (See Record, pages 24–26.) The final paragraph of said decision is literally as follows (page 26):

"After reviewing the above cited articles, the decree appealed from is hereby revoked, and therefore the *decision of June 2nd* is declared in *full force and effect*, whereby the cautionary annotation was ordered as well as the notification to Sarria, without making any special decision as to costs. Have the records sent back to the judge with a certified copy of this opinion; said judge, Romulo Villahermosa, *being careful to proceed in future in accordance with the law.*"

This decision was certified to the court below in January, 1896, and in March following plaintiff's procurador requested said court to notify both Sarria and the registrar that the order of June 2, 1894, was still in full force and effect, which notices were accordingly issued and served. The defendant in error replied to this notice that:

"Having received notice that the installment of the mortgage has been transferred to Mr. Antonio Roig, who has recorded said transfer in the registry of property, and supposing that he will proceed to collect the same judicially as he did the previous installment, he is unable to accept the notification and he will appear before the audiencia in the premises." (See Record, page 26.)

The registrar also made a reply, refusing to comply with the order for two reasons: First, because subsequent to the illegal cancellation of the cautionary notice the property as well as the encumbrance had been transferred on the registry; and, second, because the mortgage law contained no provision regarding the form of carrying into effect such an order. (See Record, page 26, bottom.) Thereafter the plaintiff asked the court for a further order to the registrar, but this was denied. This case then proceeded to proof and final argument and resulted in a final decree on December 15, 1896, adverse to the plaintiff's rights; from which decree he took an appeal, which was duly admitted in both effects, and on the same day an order was received from the appellate court to admit an appeal in both effects from the rulings denying the further order to the registrar above referred to; and on February 15, 1897, the appellate court consolidated these appeals and ordered the suspension of any further proceedings until their final decision. (See Record, page 27.)

In the above condition affairs remained when the war with Spain resulted in the change of sovereignty in Porto Rico. By military order the territorial audiencia was abolished, and there was created in its place the district court of San Juan. This court on September 29, 1899, ren-

dered its final decision upon said appeals, reversing the action of the court below, declaring the plaintiff to be legally proven an heir of Manuel Sixto, and also reversing the order of June 1, 1896, which carried with it the order of May 16 of the same year, whereby the court below had refused to compel the registrar to obey the order of April 10, 1896, to reinstate the cautionary notice. (See Record, pages 27–29.)

During this long struggle over plaintiff's rights all the installments of the debt had become due. We have already stated the circumstances under which defendant in error paid the first installment into the court of first instance in the *ex parte* proceeding of Maria Belen Sixto to be declared sole heir *ab intestato*. The second installment did not fall due until May 15, 1894, but the defendant in error voluntarily anticipated its payment by making said payment on April 4, 1894, at which time a partial cancellation of the mortgage was executed before a notary relieving the land from any lien so far as the first and second installments were concerned. (See Record, pages 33 and 34.) The court will notice that this payment was made before it was due, without assigning any reason therefor, and *on the very day* that plaintiff in error filed in the Humacao court his complaint in the contentious proceeding which that court had required him to substitute for his attempted *ex parte* proceeding and in which Sarria was soon after given notice not to pay. It was evidently their common purpose to make the payment before notice of plaintiff in error's rights was officially brought home to defendant in error.

The third payment fell due on May 15, 1895. The cautionary notice on the registry had been illegally canceled by the judge of first instance by his order of August 30, 1894, and on September 11, 1895, Maria Belen had taken advantage of this illegal cancellation to transfer the last two installments of this debt with its mortgage security to one Antonio Roig. (See Record, pages 35 and 36.) Roig had

brought some kind of a suit (presumably collusive, as plaintiff in error was not made a party) to compel defendant in error to pay the third installment to him, which they claimed had been done. But the court will notice that before this third payment fell due, to wit, in January, 1895, the appellate court had issued its order to Sarria, and the same had been served, requiring the latter to hold the same until the final determination of the main litigation. (See Record, pages 21 and 22.) This order was never reversed or questioned, though defendant in error stated in his acceptance of the notification that he would "appear before the audiencia (appellate court) in the premises."

The fourth installment fell due May 15, 1896, and defendant in error says he paid it to Roig, "supposing that he will proceed to collect the same judicially, as he did the previous installment" (Record, page 26), although the order of the audiencia of January 5, 1895, was still in full force, and the appeal from the cancellation of the cautionary notice had been allowed for both effects and said cancellation had been declared erroneous by decree of November 29, 1895, of which he had notice on May 4, 1896, if not before. (See Record, page 26.)

Such being the history of the litigation so far as the parties to this suit had been parties, and the final decision having been in favor of the rights of plaintiff in error to be considered a joint heir of his deceased natural father, Manuel Sixto, the present suit was begun in the Federal court for Porto Rico in October, 1902, by the plaintiff in error against the defendant in error, not to enforce any supposed lien upon the property originally conveyed to defendant in error by said Manuel Sixto, but to recover his one-half of the *debt* due by defendant in error to said Manuel Sixto at the time of his death, which had either never been paid or, if paid at all, had been wrongfully paid to persons not entitled to receive it. (See declaration, Record, page 1, and bill of particulars, Record, page 4.)

A demurrer to the declaration was filed and overruled, and then, on November 11, 1902, defendant filed two pleas, one the general issue, and the other a special plea setting forth the death of Manuel Sixto, the *ex parte* proceedings resulting in declaring Belen Sixto sole heir, and the payment by defendant of the first installment into said court where said proceedings were pending under an order issued by said court; also a certain foreclosure proceeding brought by Antonio Roig as owner of the third installment against him, in which an alleged decree was entered requiring him to pay said installment to Roig, which he did in obedience thereto. (See Record, pages 5 and 6.)

Plaintiff in error filed a demurrer to this second plea, which, upon consideration, was overruled by the court (see Record, page 7), and issue was then joined thereon. The trial began on November 14, 1902, and plaintiff concluded his evidence during the following day. After defendant had begun the introduction of his evidence, discovering that he had made no defense as to the second and fourth installments, he asked permission of the court to file an additional plea (see Record, page 31), which was granted over the exception of plaintiff. This plea appears on page 9 of the Record. Thereafter, under the instructions of the court, certain exceptions being taken by plaintiff to the charge to the jury as well as refusals to charge, as requested by plaintiff, the jury returned a verdict for defendant, upon which judgment was duly entered. (See Record, page 10.) From said judgment a writ of error has been duly sued out to this court, and the following errors assigned (Record, pages 12–14):

I.

The court erred in overruling the demurrer of plaintiff to the pleas filed therein by defendant on November 11, 1902.

II.

The court erred in allowing the defendant, during the trial of said cause, and after the plaintiff had rested his case, on November 15, 1902, to file his additional plea and compel plaintiff to join issue thereon against the objections made by the plaintiff thereto.

III.

The court erred in allowing the defendant, as a witness in his own behalf, to testify against the objection of the plaintiff, with reference to the last two installments of the debt, which was the subject-matter of the suit, as follows, to wit:

"I was ordered by the audiencia territorial to pay the same (meaning the installments) to Roig."

IV.

The court erred in allowing the defendant to introduce in evidence, against the objection of the plaintiff, the certificate of the registrar of property as to the entry in said registry affecting the title to a farm called "Monte Santo," a mortgage on which had been given merely as security for the debt which was the subject-matter of the suit.

V.

Because the court erred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"On November 21st, 1893, after one of them (the installments) had become due, one Belen Sixto was declared his heir. That was by a procedure peculiar to the Spanish courts but nevertheless legal; so, under the law being declared such heir, I say to you as a matter of law, that gave her the right to collect the assets of the estate."

VI.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the following language to wit:

"On February 15th, 1894, she having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

VII.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the following language, to wit:

"A suit was brought by Adolfo Sixto on April 4, 1894, against Belen Sixto in order to have his right also as an heir declared. The debtor for this purchase-money, Sarria, had no notice of this suit until June 5, 1894, and that was after two payments had been made, Belen Sixto having had the right to collect them."

VIII.

The court erred in charging the jury, against the objection and exception of the plaintiff, in the language following, to wit:

"In this contentious suit by Adolfo Sixto against Belen this defendant Sarria was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal

from that judgment, but not from that portion of it that canceled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on November 27th, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments. I say to you as a matter of law that there was nothing to hinder her from doing that at that time; she had in law the right to do it."

IX.

The court erred in refusing to charge the jury, upon the written request of the plaintiff, in the language or to the effect following, to wit:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the rights of other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff is shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

X.

The court erred in refusing to charge the jury, upon the written request of the plaintiff, in the language or to the effect following, to wit:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 31, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void and

the former annotation remained in force, which was notice to all the world including this defendant that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

ARGUMENT.

The first two assignments of error may be argued and considered together, so far as the merits of the respective pleas are concerned.

The demurrer speaks of the "second and third" pleas because they were paragraphed separately and were at the time so considered, but the two paragraphs are doubtless in legal effect one plea, which is found on pages 5 and 6 of the Record. The demurrer is found on page 7 and contains two grounds: first, because the matter alleged does not constitute any legal or sufficient defense to plaintiff's cause of action, or to his right to claim payment of the installment referred to; and, second, because it set forth matters concerning an alleged suit between defendant and a third party, to which neither plaintiff nor any privy of his was a party; hence the result could not bind the plaintiff. This demurrer should have been sustained.

(*a.*) The first ground was good, because the plea was defective in form. It begins as a "second plea to the *declaration*" as a whole, while the body of it is found upon inspection to present a defense at best to only two out of four installments claimed by the declaration. It is well settled that under the common-law system of pleading (which prevails in the Federal court of Porto Rico) a plea which in

form goes to the whole declaration, yet in fact presents a defense to only a portion of the cause of action, is demurrable.

Hogan *vs.* Ross, 13 How., 173, 182.
Wood *vs.* Franklin, 3 Cranch (C. C.), 115.
Cook *vs.* Tribune Ass'n, 5 Blatchf., 352.
Gillespie *vs.* Thomas, 15 Wend., 464.
Flemming *vs.* Hoboken, 40 N. J. L., 270.

In the case of Hogan *vs.* Ross, *supra*, the court says:

"It is a settled rule in pleading, that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality in answer to part only of such declaration or count, the plea is bad, and the defect may be availed of on demurrer. * * * In the case before us, every plea tendered by the defendants embraces within its commencement the entire cause of action, averring that the plaintiff should not have or maintain his action; yet each of them in its body and substance is limited to the condition of the injunction bond and to some stipulation in that condition to which each plea specifically refers. The pleas demurred to, therefore, could not but be properly overruled."

(*b.*) The first ground was also good as to the substance of the first paragraph of said plea—*i. e.*, the allegations regarding the payment of the first installment of the debt. These allegations in substance were (after a recital explaining the creation of the debt) that Manuel Sixto died intestate; that by "proceedings *ab intestato*" in a court of general jurisdiction touching the settlement of his estate the defendant had been ordered by the court to pay and deposit said installment in said court, and in obedience to such order had paid the same, with interest, into said court. There was no allegation that plaintiff was a party to these proceedings, and, unless such proceedings were *in rem*, any action of the court therein could not affect plaintiff's rights. As the alleged proceedings were described as "proceedings *ab intestato*," the

court, in deciding the demurrer, was bound to take notice of their character and the law governing them and their effect. This is found in sections 977 *et seq.* of the Code of Civil Procedure, which in the original Spanish reads as follows:

"977. Practicadas las medidas indispensables para la seguridad de los bienes, ordenadas en la sección anterior, y sin perjuicio de continuar en las mismas diligencias la formacion de inventario, se procederá en pieza separada á hacer la declaración de herederos abintestato.

"978. Tambien podrá hacerse esta declaracion á instancia de los interesados, sin que precedan dichas diligencias, en los casos en que no sea necesaria ni se solicite la prevención del abintestato.

"979. Los herederos abintestato, que sean descendientes del finado, podrán obtener la declaración de su derecho justificando con los correspondientes documentos, ó con la prueba que sea posible, el fallecimiento de la persona de cuya sucesión se trate y su parentesco con la misma; y con información testifical, que dicha persona ha fallecido sin testar, y que ellos, ó los que designen, son sus únicos herederos.

"Para deducir esta pretension no necesitarán valerse de Abogado ni de Procurador.

"980. Dicha información se practicará con citación del Promotor fiscal, á quien se comunicará después el expediente por seis dias para que dé su dictamen. Si éste encontrare incompleta la justificación, se dará vista á los interesados para que subsanen la falta.

"También se practicará el cotejo de los documentos presentados con sus originales, cuando lo pidiere el Promotor fiscal, ó el Juez lo estimare necesario.

"981. Practicadas las diligencias antedichas, el Juez, sin mas trámites, dictara auto, haciendo la declaración de herederos abintestato si la estimare procedente, ó denegándola con reserva de su derecho á los que lay hayan pretendido, para el joicio ordinario. Este auto será apelable en ambos efectos."

The sections following treat of manner of recognition of heirs in ascending or collateral lines up to section 1000. Then follows:

"1001. Hecha la declaración de herederos abintestato por

auto ó sentencia firme, se acomodará este juicio á los trámites establecidos para el de testamentaria.

"1002. El Juez mandará que se entreguen á los herederos reconocidas todos los bienes, libros y papeles del abintestato, y que el administrador les rinda cuentas, cesando la intervención judicial,"

continuing with some exceptions which are not material.

The translation of the foregoing sections as officially made and published by the Division of Insular Affairs of the United States War Department in the year 1901 is as follows (the sections being numbered one lower than in the Spanish edition):

"976. After the measures indispensable for the security of the property prescribed in the foregoing section have been taken, and without prejudice to including in the same proceedings the making of the inventory, the designation of heirs *ab intestato* shall be proceeded with in a separate record.

"977. This designation may also be made at the instance of the interested parties, without the necessity of previously taking the steps mentioned, in cases in which they are not necessary and in which the institution of intestate proceedings is not requested.

"978. Heirs *ab intestato* who are descendants of the deceased, may obtain a declaration of their rights by proving with the proper documents or with the evidence obtainable, the death of the person whose estate is in question, their relationship to the same, and with the evidence of witnesses that said person died intestate, and that they, or the persons whom they designate, are his only heirs.

"The services of a solicitor or attorney are not necessary in order to present this claim.

"979. The deputy public prosecutor shall be cited to appear at said proceeding, to whom the record shall afterward be referred for the period of six days for his report thereon.

"Should he find the proof insufficient, a hearing shall be granted to the interested parties in order that they may cure the defect.

"When the deputy public prosecutor requests it, or the

judge considers it necessary, the documents presented shall be compared with the originals.

"980. When the foregoing steps have been taken, the judge shall, without further proceedings, make a ruling designating the heirs *ab intestato* should he deem it proper, or he may refuse to make such declaration, reserving the rights of the claimants to institute an ordinary action. This ruling may be appealed from both for review and a stay of proceedings. * * *

"1000. After the declaration of heirs *ab intestato* has been made, by a final judgment or ruling, the proceedings shall be continued according to the procedure prescribed for testamentary proceedings.

"1001. The judge shall order that there be delivered to the heirs instituted all the property, books, and papers of the intestate, and that the administrator render an account of his administration to them, the judicial intervention ceasing."

From this it clearly appears that the proceedings attempted to be set up as causing a discharge from liability for the first installment by virtue of its payment into court therein were no more than summary *ex parte* proceedings, wherein no process was issued and not even a publication made as notice to the world. The *declaration of heirship* was the sole end and object of the proceeding, for, while one section speaks of an "administrator" being appointed, such an official under the Spanish law means nothing more than what we would call a "curator," *i. e.*, a temporary custodian of the effects of the dead person, pending the *ex parte* adjudication, as is shown by the last section cited. This speaks only of three kinds of property belonging to the deceased, to wit, his books, his papers, and his "bienes." While the last word is translated into English as "property," it really means only *real* property, or, at most, includes such visible and tangible personalty as would need care and preservation by a temporary curator. There is no word in any part of this statute authorizing this "administrator" to assume control over choses in action or to pay or collect

debts. In other words, the administration or settlement of the estate, as we understand these terms, was no part of this proceeding, as, upon the turning over of the visible assets enumerated as likely to have come into the temporary possession of this so-called "administrator," "the judicial intervention ceasing" (ceased).

Any alleged order of the court in this proceeding requiring a debtor of the estate to pay over his debt to this "administrator" would therefore be entirely void. This is further shown by the provisions of section 381 of the mortgage law, which in Spanish and English reads as follows:

"381. Los bienes adquiridos por herencia ó legado no pueden ser liberados sino después de transcurridos cinco años desde la fecha de su inscripción en el registro."

"Property acquired through inheritance or legacy cannot be cleared until five years have elapsed from the date of their record in the registry."

In any event, the rights of the plaintiff in error could not be concluded by the proceedings of a court wherein neither he nor any privy of his was a party and of which he had neither notice nor knowledge. This is so well settled that citation of authority is hardly necessary, but we cite the following cases showing that the decisions of the American and Spanish courts of last resort are harmonious:

Powers *vs.* Johnson, 139 U. S., 156.

Bedon *vs.* Davie *et al.*, 144 U. S., 142.

Dupasseur *vs.* Rochereau, 21 Wallace, 130; 4 Louisiana, 382.

Cansino *vs.* Mison (Sup. Ct. of Spain), vol. 4, Jurisp. Civil, 212 (sentencia of March 28, 1859).

Civil Code of Porto Rico, art. 1252.

The last paragraph of the opinion in Bedon *vs.* Davie, *supra*, is as follows:

"As the plaintiffs in the present suit, the heirs-at-law of Dr. William Richardson Davie, were not parties to the suit of Beckham against De Saussure, the judgment in that suit was of no force or effect in favor of the plaintiff in error as against the decree in the suit of Frazer *vs.* Davie."

The Spanish and English versions of the above-cited article 1252 of the Civil Code are as follows:

"Para que la presunción de cosa juzgada surta efecto en otro juicio, es necesario que, entre el caso resuelto por la sentencia y aquél en que ésta sea invocada concurra la más perfecta identidad entre las cosas, las causas, las personas de los litigantes y la calidad con que lo fueron.

"En las cuestiones relativas al estado civil de las personas y en las de validez ó nulidad de las disposiciones testamentarias, la pre sunción de cosa juzgada es eficaz contra terceros, aunque no hubiesen litigado," etc.

"In order that the presumption of the *res adjudicata* may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such.

"In questions relating to the civil status of persons, and in those regarding the validity or nullity of testamentary provisions, the presumption of the *res adjudicata* shall be valid against third persons, even if they should not have litigated."

The latter clause, so far as it affects our case, is limited to questions relating to the "validity or nullity of *testamentary* provisions," while the proceeding of which we are treating was rendered possible only by *lack* of a testament (*ab intestato*).

This provision, however, is even more restricted by the sentencia of the supreme court of Spain above cited, which involved the question of the nullity of a will by which a certain legacy had been bequeathed for the benefit of poor persons, and in which the court not only held the general

principle that " decrees of courts do not prejudice or bind those not parties thereto," but refused to sustain a decree of the lower court declaring the will in question null until some representative of these interested beneficiaries had been summoned before the court to be heard upon the question, and remanded the case again for that purpose.

(c.) The first ground of demurrer was also good as to the merits of the second paragraph of said plea. This paragraph set up as a defense, so far as the third installment of the debt was concerned, a judgment of the "audiencia territorial," rendered February 18, 1896, in a foreclosure suit for the collection of this installment, brought by one Antonio Roig, as assignee or purchaser from the other heir, Belen Sixto, against the defendant in error, in which a judgment of foreclosure was entered and Sarria was compelled to pay by threat of execution.

This plea could only be good by virtue of the principles of estoppel or *res judicata*, for the application of which it was necessary to allege that plaintiff in error had been party or privy in some way to said litigation so that its result should be binding upon him. This is not alleged, and, as subsequently appeared from the evidence, was not the fact; hence the authorities last above cited apply and the ruling of the court was erroneous.

The salutary effect of this rule, holding persons not bound or affected by the results of litigation to which they are not parties, can never be better illustrated than in this instance. This decree between Roig and Sarria was made by the audiencia little more than two months after the same court had reversed the court below as to the cancellation of the notice to Sarria in the suit to which our client *was* a party, had declared valid and in full force the order requiring him to hold this same money to abide the result of the suit in which the order was issued, and which order they had also reinforced by a direct one of their own. Only one logical

conclusion is possible, which is that the Roig-Sarria suit was collusive, and, as the record went to the appellate court, did not show all the facts; in other words, Sarria had an arrangement with Roig to their mutual advantage and did not *try* to avoid the payment.

(*d.*) The second ground of the demurrer simply set out more specifically the ground above argued as to the insufficiency of both paragraphs of the second plea, and the argument in support thereof is covered by what has been said upon the first ground.

(*e.*) The objections to the additional plea filed during the trial on November 15, 1902 (Record, page 9), are found on page 31 of the Record, which constitutes the second assignment of error.

So far as the exercise of the court's discretion in allowing the filing of this plea depended upon the question of the *time* at which it was offered, we will not further urge our objection, as, if the plea had presented a valid defense, the filing might have been allowable as a stretch of discretion "in furtherance of justice," but we still urge and insist that the last ground of objection was well taken, to wit, "that said plea was defective, insufficient, and demurrable for the same reasons set forth in the demurrer theretofore filed by plaintiff to the original plea," and therefore said additional plea should have been refused.

The first paragraph, which refers to the second installment, merely alleges, as to it, that Belen Sixto had, before its payment, been declared heir *ab intestato* of Manuel Sixto and was then the *record* owner of said mortgage credit. (The printed record reads "*second* owner," but that is clearly a clerical error.) This paragraph is clearly more defective than the first paragraph of the second original plea, because it does not even allege that such payment was ordered by any court, but implies that it was voluntary.

The second paragraph covers both the third and the fourth installments and merely alleges that Belen Sixto had assigned them to one Roig, which assignment had been duly recorded, and said installments thus appeared to belong to Roig, and defendant paid them to him.

It makes no claim that the payment was other than voluntary. It also omits any allegation as to why Belen Sixto had any alleged right to own or transfer them, and even if it did it would still be insufficient, because *non constat* that she did not transfer them subject to the claim of plaintiff in error by virtue of the cautionary notice, as is shown by article 71 of the mortgage law, which, speaking of these cautionary notices, says:

"Los bienes inmuebles o derechos reales anotados podran ser enajenados o gravados, pero sin perjuicio del derecho de la persona a cuyo favor se haya hecho la anotacion."

(*Translation.*)

"The real property or property rights which are entered (*i. e.*, noted against) may be conveyed or encumbered, but without prejudice to the right of the person in whose favor the entry (cautionary notice) was made."

As these two paragraphs were tendered as an "additional plea," we submit that they must stand or fall by themselves as against a demurrer or objection to filing; that, so considered, they clearly represent no sufficient defense of payment as to the second, third, and fourth installments, and that they were even more subject to the demurrer than the second plea originally filed, aside from the question of greater scrutiny to which a plea offered late should be subjected.

The discussion of the assignments of error to the charge of the court based upon and referring to the defenses set up by these pleas will necessarily include the question of their sufficiency, and we therefore ask the attention of the court to subdivisions IV and VI of this brief.

II.

The third assignment is that the court erred in allowing defendant, as a witness in his own behalf, to testify orally, with reference to the last two installments of the debt sued for, that he "was ordered by the audiencia territorial to pay the same to Roig."

The objections made were that "the subject inquired about was immaterial and irrelevant to the issues made," and that "it was not shown that the plaintiff was a party to any such suit, and if not a party he could not be bound or his rights affected by any decree or order made therein" (Record, page 35).

The ruling upon this objection was important, because this oral statement was the only evidence admitted which supported defendant's pleas of payment as to the third and fourth installments. The only other evidence referring in any way to the matter was the two documents appearing in the Record at pages 35 to 36 and 40 to 43, but the reference therein is wholly by way of *recital*, and such recitals are not evidence against persons not parties to said instruments.

Civil Code of Porto Rico, art. 1186.
Herron *vs.* Dater, 120 U. S., 464.
Murphy *vs.* Packer, 152 U. S., 398.

The first citation is from the Civil Code of Porto Rico as adopted by the Legislative Assembly of Porto Rico and approved by the governor March 1, 1902, and in force at the time of the trial, of which the English version is official and is as follows:

"SEC. 1186. Public instruments are evidence, even against a third person, of the fact which gave rise to their execution and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein."

In the case of Herron *vs.* Dater, *supra*, the court, at page 478, speaking of a recital in a patent to which plaintiffs were neither parties nor privies, says:

"Peter Grahl, the patentee, was not connected with the title under the warrant and survey, otherwise than by the recital contained in the patent itself, that the tract had been previously conveyed to him by Lewis Walker. Clearly that recital was not evidence against the plaintiffs, for if the patent could not take effect against them without it, it could not give any effect to that recital."

(*a.*) The second ground of objection was made in pursuance of the position assumed upon the pleas as to these same installments, and the authorities already cited in the discussion of the demurrer are again referred to. The previous answer of the witness had closed with the statement "Roig sued me to *foreclose* the third installment." This is the only evidence of the character of that suit, which is thus fixed by defendant's own admission. The only exceptions to the rule that records of suits are *res inter alios acta* as to persons not parties are some suits *in rem*. It is settled beyond question that a suit to foreclose a mortgage is not a suit *in rem*, but is personal and transitory wherever the mortgage does not convey the legal title but constitutes in legal effect only a lien.

Gill *vs.* Bradley, 21 Minn., 15.
Cole *vs.* Connor, 10 Iowa, 299.
Chouteau *vs.* Allen, 70 Mo., 353.
Dupasseur *vs.* Rochereau, 21 Wall., 130.

But, even if it were *in rem.*, it could not operate to the prejudice of third parties without some notice by publication or otherwise of its pendency.

Hassal *vs.* Wilcox, 130 U. S., 493.

(*b.*) The first ground of objection was intended to cover the insufficiency of the answer, because an oral statement would

be inadmissible as proof of what must be a matter of record, which record must be produced.

Morgan *vs.* Abbey *et al.*, 63 Cal., 56.
Woodbridge Co. *vs.* Ritter, 70 Fed., 677 (C. C. A.).
B. & O. R. R. Co. *vs.* Rambo, 59 Fed., 75 (C. C. A.).
Weatherhead *vs.* Baskerville, 11 How., 329.
Taylor *vs.* Riggs, 1 Pet., 591.

The statement objected to was inadmissible upon any ground, and its effect could not help being highly prejudicial to plaintiff in error.

III.

The fourth assignment of error is to the admission in evidence on behalf of defendant in error of a certificate issued by the registrar of property as to the entries in said registry affecting the title to the real estate by virtue of the mortgage given by defendant in error to secure the payment of his debt sued for in this action.

The grounds of objection to the introduction of this certificate were "that said document was only secondary evidence of the matters therein certified; that it did not contain the full contents of the instruments registered, but only a memorandum or extract of what, in the registrar's opinion, was the legal purport of such instruments, and that the instruments so recorded themselves, or proper copies thereof, were the best evidence of the transactions" (Record, page 37).

The validity of this objection can be seen from the material parts of said certificate, which are copied in the Record on pages 37 to 40, which show that the "inscription" is not a literal copy of the instrument recorded, but only a memorandum. For example, take the so-called decree of the court declaring Belen Sixto heir *ab intestato*. The "inscription" of that decree appears copied at the bottom of

page 37 and the top of page 38 of the Record. The full copy was in that instance also introduced by defendant and appears on page 30 of the Record. The other entries are of a precisely similar character. The same is further shown by the provisions of the law governing these inscriptions, which is contained in article 9 of the mortgage law (official translation, U. S. War Dep't, page 12) and reads as follows:

"Every record made in the registry shall contain the following details:

"1. The nature, location and bounds of the realty which is the subject of record, or which is affected by the interest which is to be recorded, its superficial area measured according to the standard used in the country, and its equivalent in the metrical system, and its name and number, if they appear in the deed.

"2. The nature, extension, conditions, and liens of any kind, of the interest recorded and its value, if it appear in the deed.

"3. The nature, extension, conditions, and liens of the interest on which is created that which is subject of record.

"4. The nature of the instrument which is to be recorded and its date.

"5. The name and surname of the person, if it is an individual, or, if not, the name of the corporation, or the names of all the parties interested in whose favor the record is made.

"6. The name and surname of the person, or the name of the corporation, or of the legal person who is the last owner of the interests or estates which are to be recorded.

"7. The name and location of the court, notary, or official who executes the instrument which is to be recorded.

"8. The date of the presentation of the instrument to the registry, with a statement of the time.

"9. The conformity of the record with the copy of the instrument from which it was taken, and if the latter is one of those which are to be kept in the office of the registry, the liber in which it is entered will also be indicated.

"10. The date of the record and the full signature of the register."

In connection with these provisions we cite sections 1188 to 1190 of the Civil Code, which went into force in Porto Rico on July 1, 1902 (before the date of the trial), as to what kind of evidence of instruments should be admitted. This latter code was enacted in the English language, but it is an exact re-enactment of the articles numbered 1220 to 1222 inclusive. These sections read as follows:

"1188. Copies of public instruments of which there is an original or protocol, contested by those they prejudice, shall have force of proof only when they have been duly collated.

"Should there be any difference between the original and the copy the contents of the former shall govern.

"1189. Should the original instrument, the protocol, and the original record have disappeared, the following shall constitute evidence:

"1. First copies made by the public official who authenticated them.

"2. Subsequent copies issued by virtue of a judicial mandate, after citing the persons interested.

"3. Those which, without a judicial mandate, may have been taken in the presence of the persons interested and with their consent. In the absence of the said copy, any other copies, thirty or more years old, shall be evidence, provided they have been taken from the original by the official who authenticated them or by any other in charge of their custody.

"Copies less than thirty years old, or which may be authenticated by a public official, in which the circumstances mentioned in the preceding paragraph do not concur, shall serve only as a basis of written evidence.

"The force of proof of a copy shall be weighed by the courts according to the circumstances.

"1190. The entry in any public registry of an instrument which may have disappeared shall be weighed according to the rules established in the last two paragraphs of the preceding article."

These quotations of the law plainly show that the certificate offered should not have been admitted in the absence of proof of the loss of all primary evidence. Such statutes must be strictly followed.

Smith *vs.* United States, 5 Pet., 292.

Moreover, the admission of this certificate was important and prejudicial to the interests of plaintiff in error, not only because of its violation of the rules regulating the *kind* of evidence admissible in proof, but also because the admission of such a certificate had a tendency to mislead the jury as to the issues being tried, leading them to believe that if the mortgage lien had been canceled, whether rightfully or wrongfully, the debt itself had been released and plaintiff could not recover. In fact we believe the court itself became confused as to the distinction between the existence of the *debt* and the existence of the *lien*, and such confusion caused the erroneous ruling on the evidence and the misleading charges.

IV.

The fifth, sixth, and ninth assignments of error may be argued together. The fifth excepted to the following paragraph of the charge given by the court to the jury:

"On November 21st, 1893, after one of them (the installments) had become due, one Belen Sixto was declared his heir. That was by a procedure peculiar to the Spanish courts but nevertheless legal; so, under the law being declared such heir, I say to you as matter of law, that gave her the right to collect the assets of the estate."

The sixth assignment excepted to the following paragraph upon the same subject:

"On February 15, 1894, she having been declared the heir, the entry was made of that fact in the registry (of property). I say to you as a matter of law that that declaration of her heirship was without prejudice to the rights of third parties—and that meant that if any other person showed himself afterwards to be an heir he was entitled to a proper proportion of the estate, but so far as a collection of debts and so far as a proper attention to the assets were concerned and the control of them, she became entitled to attend to that."

The ninth assignment excepted to the court's refusal to give the jury the following instruction requested:

"As the *ex parte* decree declaring Belen Sixto the heir of Manuel Sixto expressly saved the rights of third parties, that was notice to the defendant that any payment made to her was made at his peril as against the rights of other true heirs; and, as defendant was not required by any legal authority to pay the first two payments to Belen Sixto, and as the plaintiff was shown in truth to have been an equal heir with Belen Sixto, the plaintiff is entitled to recover one-half of those two payments."

(*a.*) These two charges and the request refused present the direct conflict between the views of the court and the contentions of plaintiff in error as to the law governing the payment of the first two installments. The argument already made and authorities cited in the first subdivision of this brief, discussing the sufficiency of the pleas under which defendant's evidence of the payment of these installments was introduced, is applicable to these assignments and reference is prayed thereto in support thereof; but at the time of ruling upon the pleas all of their allegations were, of course, taken as true. The evidence had, however, in some respects failed to support them. For instance, the decree declaring Belen Sixto heir *ab intestato*, when introduced, showed upon its face that such declaration was expressly limited to be "without prejudice to third parties" (Record, page 30, bottom); also there was absolutely no evidence supporting the allegation that the first installment had been paid "in obedience to an order of said court." The nearest approach to such evidence is a *recital* in the *receipt* which he obtained for such payment, which recital is as follows (Record, page 32):

"And the aforesaid deposit he makes in compliance with the order of this court of first instance, dated the 15th of the current month, and which decree was issued in the preliminary proceedings presented," etc.

But no such order or decree was introduced in evidence, and that recitals are not evidence in such cases, see the authorities already cited under subdivision II of this brief.

There was no sufficient evidence whatever in support of the plea covering the second installment, unless this court should hold that similar recitals in the instrument of partial cancellation and in the document attached to the record introduced by plaintiff and the oral statement of defendant were admissible and sufficient. We contend that none of these were proper evidence. If that contention is sound, then clearly neither of the above charges excepted to were proper to be given to the jury under the evidence.

(*b.*) But, even if there was some evidence in support of these pleas, we still contend that the charges did not correctly state the law.

1st. As to the first payment, there was no proof of any order of court, and the decree necessarily stated that it was "without prejudice to third persons." Why was this limitation put in the decree? The provisions of the mortgage law explain it. The pertinent parts of articles 2 and 23 of said law, in Spanish and English, are as follows:

"2. En los Registros expresados en el artículo anterior se inscribiran:

"1°. Los titulos traslativos del dominio de los inmuebles ó de los derechos reales impuestos sobre los mismos.

"2°. Los títulos en que se constituyan, reconozcan, modifiquen, o extingan derechos de usufructo uso, habitacion, enfiteusis, hipotecas, censos, servidumbres y otros cualesquiera reales. * * *

"23. Los titulos mencionados en los artículos 2° y 5° que no estén inscritos en el Registro, no podrán perjudicar á tercero.

"La inscripción de los bienes inmuebles y derechos reales adquiridos por herencia o legado, no perjudicara á tercero, si no huviesen transcurrido cinco años desde la fecha de la

misma. Exceptúanse los casos de herencia testada o intestada, cuando recaiga en herederos necesarios." * * *

"2. In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity, servitudes, and any others by which estates are created, acknowledged, modified, or extinguished. * * *

"23. The instruments mentioned in articles 2 and 5 which are not duly recorded or entered in the registry cannot prejudice third persons.

"The record of real property and property rights, acquired through an inheritance or legacy, shall not prejudice third persons until five years have elapsed since the date thereof, excepting in cases of testate or intestate inheritances, legacies and additions thereto, when left to legal heirs."

The last paragraph is in consonance with article 381 of the same law, already cited in subdivision 1 of this brief.

Such a summary and temporary proceeding as that of the *ex parte* declaration of heirship *ab intestato* under the civil procedure before cited must therefore necessarily be "without prejudice to third persons," and, as hereinbefore suggested, no authority was given thereby to collect debts or to do more than take charge of the property in actual possession of the deceased and preserve it from waste and destruction.

The charge of the court in effect limited the meaning of the phrase "without prejudice to third parties" so as to shut out an absent heir from being included in the term "third parties" and leaving him solely with redress against those who might have been declared heirs in his absence, and of course, as a result, if such heirs have frittered away the inheritance or have converted it into cash and put it in their pockets, the absent heir remains remediless, and all this by force of a proceeding absolutely *ex parte*, in which no process

or notice is issued to anybody. We submit that this cannot be the law in any country, and especially where the supreme court of that country has declared, in exact concordance with our own laws, that judgments of courts bind only parties and privies (sentencia of March 28, 1859, hereinbefore cited).

We have been unable to discover any decision of the supreme court of Spain involving the exact question here in controversy, but one of the leading commentators, or, as we should call them, text-writers, upon Spanish law is Galindo, who, in his work upon the mortgage law, in discussing the legal effects of the provisions of the last paragraph of article 23, above quoted, expresses his opinion in the following words:

"Aplicado estrictamente el principio del art. 23, podria convertirse el Rigistro de la propriedad, en medio seguro para burlar legítimos derechos que por circunstancias especiales no pudieran ejercitarse en determinados momentos, y que el legislador no debía dejar desamparados.? Quién puede asegurar que un testamento que se presenta como titulo de adquisición, no está revocado?? Quién puede afirmar que los que se declaran herederos *ab intestato* son en efecto los que tienen mejor derecho á la herencia? * * *? sería justo, dada la imposibilidad de aducir pruebas legales de que el que inscribe es el verdadero heredero, aplicar el principio del art. 23 á los bienes adquiridos por herencia ó legado, y que su inscripción perjudicase a los verdaderos sucesores? Nadie habrá que sostenga la afirmativa. Bueno es, y aun necesario para robustecer el crédito territorial, dar eficacia á la inscripción desde que se hace, á fin de que si alguno desea adquirir un inmueble, esté seguro de que la persona con quien contrata es dueño del mismo, pero no por asegurar el crédito, debe prescindirse de sacratísimos derechos. Para proteger los algún tanto, se consignó la excepcion que del principio general establecido en el art. 23 de la ley de 1861, introdujo la de 1869, según la que, la inscripción de bienes adquiridos por herencia ó legado, no perjudica á tercero hasta después de transcurridos cinco años" (V. Res. de 26 Mar., 1889, pages 274, 275).

"Inscrita la herencia, y no transcurridos, el que quiera contratar sobre los bienes que la constituyen, cuidará de cerciorarse de si puede haber otra persona con mejor derecho que la que los tiene inscritos a su favor, y obrará según su prudencia le aconseje; pues la sabe que la irrevocabilidad de su adquisición estriba en que aparesca ó no quien tenga mejor derecho que el heredero á cuyo favor se han inscrito los bienes. Pasados cinco años, ya no tiene necesidad de esas averiguaciones; le basta saber que adquiere de quien tiene inscrito su derecho.

"Si la inscripción de bienes adquiridos por herencia ó legado no ha de perjudicar á tercero hasta que hayan transcurrido cinco años desde su fecha, dicho se esta que tampoco perjudicaran a ese mismo tercero las inscripciones posteriores; por más que ya no sean de herencia, sino de venta, donación, hipoteca etc., porque recibiendo éstas su fuerza de aquélla, no han de surtir mas efecto; pero entiéndase bien, que esto es con relación al tercero que tenga derecho á la herencia, y no á otros terceros. Pondremos un ejemplo que comprenda los dos casos:

"A. inscribe su título de heredero de B.; si dentro de los cinco años se presenta el que lo sea cerdaderamente, no puede perjudicarle aquella inscripción, aunque se hayan transmitido los bienes uno o mas veces sucesivas. A. vende los bienes á C., pero éste no inscribe su derecho, y A. los vuelve á vender á D., quien lo inscribe. Esta inscripción perjudica á C. desde su fecha, porque ya está comprendida en la regla general del art. 23. Tal es, á nuestro juicio, la interpretación de sus dos primeros párrafos (V. Res. de 17 Nov. 1888). * * * (p. 276).

"En resumen: según el art. 23 de la Ley, tal como hoy está redactado, la inscripción perjudica á tercero desde su fecha, exceptuando únicamente la relativa á bienes adquiridos por herederos ó legatarios voluntarios, que no perjudicará á herederos de mejor derecho, sino hasta despues de transcurridos cinco años." * * *

"Si un heredero voluntario posee algún tiempo la herencia inscrita, y luego aparece un nuevo testamento y se declara que la herencia pertenece á otro á cuyo favor se inscribe, los cinco años en que la inscripción de la herencia no perjudica á tercero, ? se han de contar desde la primera, ó desde la segunda inscripción? Indudablemente desde la primera; porque el objeto de la Ley no es que cada heredero tenga

en suspenso su derecho cinco años, sino que el verdadero sucesor goce de este término desde la primera inscripción, para hacer valer el suyo en toda su plenitud y sin menoscabo de ningún género" (page 277). * * *

"Limítase el artículo que comentamos, á consignar los casos en que las inscripciones de herencia, hechas en favor de herederos voluntarios y necesarios, perjudican á otros de mejor derecho, mas no expresa en qué consiste este perjuicio. * * * Para esclarecer estas dudas y las que puedan surgir de la lectura del art. 23, sobre las personas que han de entenderse perjudicadas, expondremos en varios ejemplos nuestra opinión * * * (page 278).

"2. Los contratantes no lo han sido con el testador, sino con los herederos voluntarios. Si la herencia pasa antes de los conco años á otros herederos, no les perjudica á éstos y podrán reclamar contra la enajenación inscrita: si han transcurrido cinco años ya, aquellas ventas les perjudican; es decir, han de pasár por ellas, salvo su derecho á repetir de los vendedores, reputados herederos cuando vendieron, el precio de la cosa enajenada. * * *

"Toda inscripcion de herencia á favor del instituído ó declarado heredero por la ley, lleva envuelta en si implícita ó explícitamente la cláusula derogatoria, 'sin perjuicio de tercero de mejor derecho;' por ello, cuando se cumple esa condición, cuando se declara por convenio ó judicialmente, que ha llegado el caso de existir un heredero de mejor derecho, naturalmente se resuelve el derecho inscrito; sólo quando por el transcurso del tiempo ha desaparecido legalmente la posibilidad de que exista otro heredero de mejor derecho, se hace firme y estable la inscripción primera, respecto á los inscribientes; hasta entonces, no. Los que inscriben en virtud de un testamento revocado, ó de una declaración judicial que se deja sin efecto, inscriben actos nulos con arreglo á las leyes, y su inscripción no los convalida, según el art. 33 de la Hipotecaria" (pp. 279, 280).

Comentarios á la Legislación Hipotecaria de España por Don León Galindo y de Vera y Don Rafael de la Escosura y Escosura. (Cuarta Edición, Madrid, 1899) Tomo II, pp. 274–280.

Translation of the Above.

"Strictly applying the principle of art. 23, the registrar's office might be converted into a medium of frustrating those legitimate rights which, because of special circumstances, could not be exercised at a fixed time, and which the law-maker ought not to leave unprotected. Who can surely aver that a will which is presented for registration as a title of ownership has not been revoked? Who can positively state that those persons declaring themselves heirs *ab intestato* are really those who have the better right to the inheritance? * * * Would it be just, taking into consideration the impossibility of producing legal proof that he who records it is the true heir, to apply the principle of art. 23 to the property acquired by inheritance or legacy, and that its recording should injure the true heirs? There will be none to sustain the affirmative. It is convenient and even necessary to strengthen the territorial credit, to give efficacy to the registration from the time it is made, in order that if any one desire to acquire real estate he may be sure that the person with whom he contracts is the owner of the same, but not even to make our credit secure should the most sacred rights be set aside. In order to protect them somewhat there was inserted the exception put in the law of 1869 from the general principle established by said art. 23 of the law of 1861, according to which exception the registry of property acquired by inheritance or legacy will not prejudice third parties until five years have elapsed. (See res. of March 26, 1889.)

"When the inheritance has been recorded and the above time has not elapsed, he who desires to contract for property pertainmg thereto will take care to ascertain if there can be another person with better right than he who has the property recorded in his name and will act as his prudence may counsel him, as he already knows that the validity of his purchase depends upon whether there should or not appear one who has a better right than the heir in whose favor the property is recorded. After the five years have elapsed there is no necessity for such investigation; it is enough to know that he from whom he acquires has the property recorded in his favor.

"If the registration of property acquired by inheritance

or legacy is not to injure a third party until five years may have elapsed from its date, it is evident that subsequent registrations likewise will not injure this third party, even if they should not be of inheritance but of sale, donation, mortgage etc., because if the latter get their force from the former they cannot have greater effect; but it must be understood that this *applies to the third party who may have a right to the inheritance and not to other third parties.* We will give an example which includes both cases:

"A. records his title as heir of B.; if within the five years he who is the true heir presents himself, that record cannot prejudice him even though the property may have been transferred one or more times successively. A. sells the property to C., but the latter does not record his title, and A. sells the property over again to D., who does record his title. This record is prejudicial to C. from its date, because it is already included in the general rule of art. 23. Such is in our judgment the meaning of its first two paragraphs. (See resolution of Nov. 17, 1888.) * * *

"To sum up: In accordance with art. 23 of the law, as it reads today, the inscription or record prejudices third parties from its date, excepting only in so far as it relates to property acquired by voluntary heirs or legatees, which will not prejudice those heirs having a better right until after five years have passed. * * *

"If a voluntary heir has for some time had his inheritance recorded and then there appears a new will and it is declared that the inheritance belongs to another, and it is recorded in the latter's favor, do the five years within which the record on the inheritance does not prejudice third parties begin to run from the first or from the second inscription? Undoubtedly from the first; because the object of the law is not that each heir should have his right suspended for five years, but that the true heir may enjoy that period from the first inscription *in order to make good his own right in all its fulness and without diminution of any kind.* * * *

"The article upon which we are commenting limits itself to the statement of those cases in which the recording of the inheritance, made in favor of voluntary and necessary heirs, prejudices others having better rights, but it does not state in what this prejudice consists. * * * In order to clear up these doubts and those which may arise from the

reading of art. 23 touching those persons to be considered as prejudiced, we will explain our opinion by several examples: * * *

"2nd. The contracting parties have not contracted with the testator but with the voluntary heirs. If the inheritance passes to other heirs before the five years have elapsed, the latter are not prejudiced in their rights and *they can claim against the recorded sale;* if five years have already elapsed, those sales do prejudice them; that is to say, they will have to recognize such sales, saving their right to demand from the vendors, who were reputed as heirs when they sold, the price of the alienated property. * * *

"Every recording of a right of inheritance in favor of one made or declared an heir by the law carries included within itself, impliedly or expressly, the limiting clause 'without prejudice to a third person of better right;' in consequence thereof, when that condition comes about, when it is declared either by agreement or judicially that there has arrived the case of an heir with better right existing, naturally the right recorded is destroyed; only when by the passing of time the possibility of the existence of another heir of a better right has legally disappeared, the first inscription, touching rights inscribed, is made final and stable; until then it is not so. Those who make a record by virtue of a will which has been revoked, or of a judicial declaration which is held to be valueless, record instruments which are null under the law, and their inscription does not validate them, as is provided by art. 33 of the mortgage law."

It clearly appears from the record that the payment of the *last* installment of the debt in controversy was made by defendant in error on or before May 16, 1896 (Record, pages 35–36), which was not only less than five years after the declaration of Belen Sixto as heir by the court, but also less than five years from the death of Manuel Sixto. Hence, if the commentator is right in his view of the law, *none* of the payments were protected by the *ex parte* declaration of heirship or the recording of the same.

The law made a distinction between *necessary* and *voluntary* heirs (as the two words have been translated). To

designate the former class, the Spanish law uses interchangeably the words "forzozos" and "necesarios," meaning thereby the wife and legitimate children from whom the father could not entirely alienate his estate by will—in other words, those whom the law *forced* a testator to provide for. Voluntary heirs, on the other hand, were those inheriting either by the *will* of the party or by legal proceedings instituted for their benefit. Clearly those declared heirs *ab intestato* belonged to the latter class, as that proceeding was called a "proceeding of voluntary jurisdiction" (Record, page 17, bottom).

We therefore submit that the charge of the court, which supported the contention of defendant that the first payment was made under an order of court, which protected defendant in its payment and cut out any claim of plaintiff except to recourse against the other heir, was based upon an erroneous view of the law, and that, in its place, the judge should have charged in accordance with the view set forth in plaintiff's request, which is the subject of the ninth assignment of error.

And we call to the attention of the court that this decree, which was "without prejudice to third parties," lies at the basis of the right claimed as to all the subsequent payments. Hence the argument and conclusion must apply to those payments as well, unless some independent defense invalidates them.

2d. As to the second payment. The testimony in support of the plea was, first, the oral statement of defendant, as follows: "The second installment, which was to fall due in May, 1894, I paid to Belen Sixto about the first of April, 1894, which payment was solemnized by a notarial act whereby the property mortgaged might be relieved from the lien of the first two installments" (Record, page 33), and, second, the copy of said notarial act, dated April 4, 1894 (Record, pages 33 and 34 [5]).

The declaration of heirship in her favor was made on November 21, 1893, and the assets in the hands of the "administrator" ordered turned over to her on the 25th of the same month, at which time, according to section 1001 of the Code of Civil Procedure (hereinbefore quoted), the "judicial intervention ceased." Hence there were no legal proceedings pending by virtue of which he could claim to be *obliged* to pay this installment. Moreover, the notarial act recites (paragraph 5) that "she has also agreed with Don Laureano Sarria that he shall pay her the second installment, *about to fall due*," etc. But the evidence further shows that on the very same April 4 the plaintiff was filing in the Humacao court his "contentious proceeding," in which the notice was soon to issue to Sarria which would make it impossible for him to pay over the money to Belen Sixto—which sufficiently shows why the time of payment was anticipated.

There is nothing in the record except the certificate of the registrar (which we claim was improperly admitted) to show that at that time even the decree of heirship had been recorded in the registry. We submit that this second payment was entirely voluntary, made in face of a decree expressly reserving the rights of third parties, anticipated in point of time for a fraudulent purpose, and in no way constituted a defense to plaintiff's demand for repayment to him as to his one-half part.

We therefore insist that the charges given by the court were erroneous, and that the charge requested by the defendant as to these two payments should have been given.

V.

The seventh assignment of error is to a charge of the court to the jury in the following language:

"A suit was brought by Adolfo Sixto on April 4, 1894, against Belen Sixto in order to have his right also as an heir declared. The debtor for this purchase-money, Sarria, had no notice of this suit until June 5, 1894, and that was after

two payments had been made, Belen Sixto having had the right to collect them."

The last clause of this charge involves the same point discussed under the previous subdivision of this brief, and we refer to that argument. But we submit that there was also error in charging positively that Sarria had no notice of plaintiff's contentious suit until June 5, the date on which the court notice was served on him.

The plaintiff had testified that he knew the defendant long before his father's death, and that defendant knew he was the son of Manuel Sixto. The evidence further showed that plaintiff began his original suit in the court of first instance of Humacao on the day before Belen Sixto obtained from the same court the decree declaring her to be sole heir, in which proceeding defendant had deposited the first installment; that plaintiff's suit, in which Belen Sixto appeared and made opposition on the same day she received her decree, continued until it was changed to a contentious suit on April 4, 1894, on which very day the defendant, by agreement with said Belen, anticipated the payment of the second installment, which did not become due and payable until the 15th of the succeeding May, and that in his petition in this contentious suit plaintiff *asked for* the process against Sarria which afterwards issued for the purpose of preventing these payments.

Upon this evidence we contend that the judge should have left to the jury the question whether Sarria did not have some notice or knowledge of plaintiff's claims and his pending effort to enforce them, instead of positively instructing them that Sarria had no notice thereof at the time of the second payment.

VI.

The eighth and tenth assignments may be considered together. The eighth excepted to a charge given to the jury in the following language:

"In this contentious suit by Adolfo Sixto against Belen this defendant Sarria was ordered on June 2, 1894, to pay into court whatever money he might be owing. That order was served on Sarria on June 5, 1894, and afterwards that court decided that Sixto, the plaintiff in this suit, was not entitled to attach this money. He obtained an appeal from that judgment, but not from that portion of it that canceled the annotation made in the registry of deeds of the attachment of that fund. Subsequently, on November 27, 1894, an appeal was allowed in the upper court from that portion of it, but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had the right to pay it over. Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments. I say to you as a matter of law that there was nothing to hinder her from doing that at that time; she had in law the right to do it."

The tenth excepted to the refusal of the judge to charge the jury at the request of plaintiff as follows:

"As it is shown by the uncontradicted evidence that the judge of the court of first instance of Humacao was entirely without authority or jurisdiction to issue his order on August 31, 1894, directing the registrar to make annotation on his books of said order, said order to the registrar was void and the annotation made by the registrar was void and the former annotation remained in force, which was notice to all the world including this defendant that the plaintiff had an interest in those payments such as might be declared by the court; and the court having afterwards decided that the plaintiff here is entitled to a one-half interest in said estate, the plaintiff is now entitled to recover one-half of the last two payments, with interest."

Irrespective of questions of law, the charge above quoted was erroneous and prejudicial to plaintiff in error because it grossly misstated the facts in proof, and thereby misled the jury in the following particulars:

1st. The charge says that "he (plaintiff) obtained an appeal from that judgment, but not from that portion of it that canceled the annotation made in the registry," and that *subsequently* an appeal was allowed in the upper court from that portion of it.

The record shows (page 19, bottom, and 20) that plaintiff's appeal was duly allowed "in due time and form" from the whole order, but for *one effect* only, and the subsequent action of the appellate court was not to *enlarge* the appeal as to the matter covered by it, but to *better* it by ordering it to be given *both effects*, and the wording of said order was that it "be considered as having been taken" for both effects.

The difference between the allowance of an appeal for one effect and for both effects is explained by the definition of each given by article 383 of the Code of Civil Procedure (382 in that of Porto Rico), which is as follows:

"383. Las apelaciones podrán admitirse en ambos efectos ó en uno solo. Se admitirán en un solo efecto en todos los casos en que no se halle prevenido que se admitan libremente ó en ambos efectos."

The following article shows that the question of allowance in one or both effects is not a matter of discretion, but of absolute right:

"384. Además de los casos determinados expresamente en la ley, se admitirán en ambos efectos las apelaciones que se interpongan: 1° De las sentencias definitivas, etc. * * * 3° De losautos y providencias que causen perjuicios irrep-a ble en definitiva."

The War Department translation of the above articles is as follows:

"382. The appeals may be allowed for a review only, or for a review and stay of proceedings also. They shall be allowed for review only in all cases in which it is not prescribed that they be allowed without limitation or for a review and stay of proceedings also.

"383. In addition to the cases expressly mentioned in the law, the following appeals shall be allowed for review and for a stay of proceedings: 1. Appeals from definite judgments, etc. * * * 3. Appeals from rulings and orders which cause definite and irreparable injury."

And it was under this last subdivision that the appellate court held our petition for appeal to have been wrongfully acted upon in not giving it both effects, and ordered it "considered as having been so taken."

This erroneous impression of the court, so impressed by his charge upon the minds of the jury, was highly prejudicial to plaintiff, because the court followed it up by saying in the same paragraph: "Between the time the court decided the attachment and the time the appeal was allowed in the upper court, Belen Sixto assigned to Roig the third and fourth installments." If these had been the actual facts the order of cancellation might have become final (firme), and the legal conclusion of the judge correct.

2d. The charge says, "Subsequently, on Nov. 27, 1894, an appeal was allowed in the upper court from that portion of it (meaning the portion which canceled the annotation), but no notice was given as to Sarria, who was merely a garnishee in the suit, and who had received no notice not to pay over the money until the lower court decided whether he had a right to pay it over." On the contrary, the record evidence showed that Sarria was notified directly by the audiencia on January 8, 1895, and again on February 8, 1895 (Record, pages 22 and 24). The latter notice was ordered because Sarria claimed not to understand the purport of the first one, and the officer serving the same showed Sarria the

order which said: "explaining to him that the requisition referred to in the attached communication is a ratification of that one made to him on the 2nd of June, *until the pending appeal is decided*," and the audiencia never modified that requirement. But afterwards, although the audiencia had on November 29, 1895, sustained plaintiff's appeal, the *lower court* arrogated to itself the authority to ignore this order of the audiencia, and on the *25th of April, 1896*, upon the petition of Sarria, allowed him to withdraw the third installment, which he had once deposited in obedience to the order of June 2, 1894 (Record, page 35), and then he paid it over to Roig. Thus it appears that the judge vitally misled the jury as to the facts which had been proven.

But we further contend that, under the facts as proven, this charge erroneously stated the law. We contend that after the service of what might be called the "garnishment notice" upon Sarria on June 2, 1894, he was never for a moment free to pay either of the last two installments until the suit between Adolfo Sixto and Belen Sixto was finally decided. We have already shown that the audiencia, before he made any payment, ordered him to hold the money to abide the result of the suit, which order never was rescinded. But we contend further that the original annotation *never was validly and legally canceled*, so that at no moment was Belen able to transfer her rights in those installments, except subject to whatever claim Adolfo might finally be decided to have.

Let us bear in mind the dates. The registrar made the annotation under the order of June 2 on June 12, 1894 (Record, page 19). The court of first instance made its order to annul the annotation on August 30, 1894, and the order to the registrar to carry out the annulment (such an order being called "ejecutoria") was signed August 31, 1894. The plaintiff's procurador was notified of the order on the same day, and on the third day thereafter (September 3, 1894) filed his petition for an appeal with both effects

(Record, pages 19 and 20), which was afterward admitted by the judge to have been presented "in due time and form." The judge allowed the appeal for one effect only, but within the proper time plaintiff appealed from that ruling and the audiencia reversed it and ordered that it "be considered as *having been taken* for both effects." The order was so worded because such allowance was a matter of *right* and not of *discretion*, as we have shown by previous citations.

1st. We contend that the "ejecutoria" issued to the registrar was void because issued before the legal time, and therefore that any action taken by him thereunder was void.

Article 82 of the mortgage law provides as follows:

"Las inscripciones ó anotaciones preventivas, hechas en virtud de escritura publica, no se cancelarán sino por providencia ejectoria contra la cual no se halle pendiente recourso de casación, ó por otra escritura ó documento auténtico, en el cual exprese su consentimiento, para la cancelación, la persona á cuyo favor se hubiere hecho la inscripción ó anotación, ó sus causa habientes ó representantes legitimos. * * * * *

"Las inscripciones ó anotaciones hechas en virtud de mandamientos judiciales, no se cancelarán sino por providencia ejecutoria que tenga las circumstancias prevenidas en el parrafo anterior," etc.

(*Translation.*)

"The records or cautionary notices made by virtue of a public document cannot be canceled except by a *final decree* from which there is no appeal in cassation pending, or by any other authenticated instrument or document, in which the person in whose favor the record or entry has been made, or his legal representative or attorney, signifies his consent to the cancellation. * * *

"The records and entries made by virtue of judicial decrees may only be canceled by a *final decree*, in which the facts provided by the first paragraph of this article appear."

When does an order or decree (providencia) become final (ejecutoria)? Any order or decree must become "firme" before it can be "ejecutoria." Article 368 of the Code of Civil Procedure shows this when it says, in defining the various terms of procedure:

"Ejecutoria, el documento publico y solemne en que se consigne una sentencia *firme*" (the public and formal instrument in which a final judgment is entered for enforcement).

When, then, does such an order or decree become final in the sense of "firme"? Article 390 of the same Code contains the following provisions:

"No se suspenderá la ejecución de la sentencia, auto ó providencia apeladas, cuando haya sido admitida la apelación en un solo efecto. * * *

"El apelante deberá solicitar dicho testimonio dentro de cinco días, expresando los particulares que deba contener. Transcurrido este término sin haberlo solicitado, se le negara el testimonio y se tendra por *firme* la resolucion apelada."

(*Translation.*)

"The execution of the judgment, ruling or order appealed from shall not be suspended, when the appeal has been allowed for a review of the proceedings only. * * *

"The appellant must request said copy within five days, stating the details it should contain. Upon the expiration of this period without having requested it, the said statement or copy shall be denied him and the decision appealed from shall be considered *final*."

The supreme court of Spain has construed these provisions by holding, in its decision of January 16, 1885, that the order or ruling does not become *final* until the expiration of the five days.

Jurisprudencia Civil, vol. 57, page 65 (cited in note to art. 390, Code of Civil Procedure).

In the " Real Academia Espanola Dictionario de la lengua Castellana " (Royal Spanish Dictionary) are found the following definitions, described as " forensic " use : " Sentencia firme—La que por no ser apelable ó por haberla consentido las partes, causa ejecutoria " (final decree—one which, by not being appealable or by having the consent of parties, can be executed). Also the following definition of " ejecutoria "—Despacho que se libra por los tribunales de las sentencias que pasan en autoridad de cosa juzgada" (the certificate which is issued by the courts of those sentences which have become *res judicata*).

The supreme court of Spain has decided that a decree is not *res judicata* so long as an appeal is pending from any part of it.

> Decision of January 11, 1876, Juris. Civil., vol. 33, page 121 (cited in note to art. 387 of Code of Civil Proced.).

We submit, therefore, that the order to the registrar was issued improvidently and prematurely and was void ; hence its record was void according to article 33 of the mortgage law hereinbefore cited.

2d. We further contend that, even if the cancellation of the cautionary notice of June 2, 1894, was not absolutely void, yet the reference therein to the pendency of this suit, following an annotation previously duly entered, put all parties dealing with the property covered by said annotation on notice of the infirmity of Belen Sixto's title, and they were bound at their peril to investigate its regularity, and such dealings were necessarily subject to what might be thereafter decreed in said suit with respect to that annotation. In other words, that when Roig bought (as is claimed) the third and fourth installments, on September 11, 1894, he was put on notice by the entry and the pretended cancellation that the ownership of those installments was in dispute and that the order of cancellation had been irregularly issued ;

that it was then his duty to investigate the status of that suit to see if he could safely buy; that, if he had done so, he would have seen from the record therein that the order of cancellation had been appealed from, said appeal being prayed for in both effects, and a further appeal taken from the order allowing it in only one effect, all of which had been done on or before September 6, 1894, and that, if he then bought, he bought with whatever burden might result from the suit.

We therefore submit that Roig could only have bought this debt subject to the rights which Adolfo Sixto was afterwards in said suit adjudged to have. If this be true under the law as to Roig, much more must it be true as to Sarria, the defendant in error, who not only had what notice the registry would give him, but also had been brought into the suit as a party and ordered to hold this very money to await its final result. The order of cancellation did not affect his liability. Article 97 of the mortgage law reads as follows:

"The cancellation of the records of cautionary notices does not in and of itself extinguish, with regard to the parties, the interests recorded which it affects; but when it has been made without any apparent cause for annulment, such as those mentioned in the following article, it shall have all its effects with regard to third persons, who, by reason thereof, may have acquired or recorded any interest, although later it is annulled for some reason which does not clearly appear from the said record of cancellation."

That Sarria was to be regarded as one of the parties and not as a "third person," so far as this annotation is concerned, is shown by article 27 of the same law, which reads as follows:

"For the purposes of this law, those who have not participated in the recorded instrument or contract shall be considered as third persons."

The Spanish word translated "instrument" is "acto," which in judicial proceedings is used as synonymous with "auto" or "proceeding." When Sarria was summoned to hold this money by judicial order he became a party to the proceeding.

As to whether a party dealing with property affected by judicial proceedings is bound to take notice of the irregularities thereof, the decision of this honorable court in the case of Patterson *vs.* Gaines, reported 6 How., 550, is very instructive. In that case the validity of sales made under pretense of judicial authority was somewhat involved, and the effect of their invalidity upon subsequent purchasers, and touching that subject the court says (at page 601):

"Under these decisions, and the view which we have taken of this point of the case, the fact of notice by the purchasers, and by the defendant from them, of the illegal and fraudulent sale, cannot be denied. The defendant knew, from the titles which he received from the purchaser, Correjollas, and from that bought by him from the other alienee of Correjollas, that the sales had been made by Mr. Relf and Mr. Chew in a representative character, and it was his duty to inquire if they legally filled it. Not having done so, he has bought in his own wrong, and the title by which he claims the property must be annulled. We have confined our remarks strictly to the objection, that these sales were made by *the donee, or universal heir of the will*, without," etc."

We submit, therefore, that the charge of the court was wrong in respect to the rights of our client, and that such charge should not have been given, while the charge requested by us should have been given as correctly expressing the law on the point involved.

It is true that literally all the judge said was that "there was nothing to hinder her from doing that (*i. e.*, selling the installments) at that time," and under article 71 aforesaid of the mortgage law she might have transferred them, but *cum*

onere. While what the judge clearly meant, and what the jury must necessarily have understood him to mean, was that she could then transfer them *free* from any claim or right of plaintiff in error to any part thereof.

VII.

We therefore submit that each and all of the errors assigned in this case are well taken; that the commission of these errors led to a wrong verdict and judgment, and that said judgment should be reversed and the case remanded to the court below for a new trial.

Very respectfully, N. B. K. PETTINGILL,
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